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Attorneys for *Defendant and Counterclaimant*  
STEARNS, CONRAD AND SCHMIDT, CONSULTING  
ENGINEERS, INC. D/B/A SCS ENERGY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ISM INDUSTRIES, INC.,  
Plaintiff,

vs.

STEARNS, CONRAD AND  
SCHMIDT, CONSULTING  
ENGINEERS, INC. D/B/A SCS  
ENERGY, MITCHELL ENERGY  
SERVICES, LLC, AND KILGORE  
INDUSTRIAL CIVIL, L.L.C.,  
Defendants.

Case No. 2:19-cv-01134-JAK-JC

**DEFENDANT STEARNS, CONRAD  
AND SCHMIDT, CONSULTING  
ENGINEERS, INC. D/B/A SCS  
ENERGY'S COUNTERCLAIM TO  
PLAINTIFF ISM INDUSTRIES,  
INC.'S COMPLAINT**

Hon. John A. Kronstadt

STEARNS, CONRAD AND  
SCHMIDT, CONSULTING  
ENGINEERS, INC. D/B/A SCS  
ENERGY, MITCHELL ENERGY  
SERVICES, LLC, AND KILGORE  
INDUSTRIAL CIVIL, L.L.C.,

Counterclaimants,

vs.

ISM INDUSTRIES, INC.,  
Counter-Defendant.

Trial Date: None Set

1 Defendant and Counterclaimant Stearns, Conrad and Schmidt, Consulting  
2 Engineers, Inc., d/b/a/ SCS Energy (“SCS”) files this Counterclaim in response to  
3 the Complaint filed by Plaintiff and Counter-Defendant ISM Industries Inc.  
4 (“ISM”) as follows:

5 **COUNTERCLAIM**

6 Stearns, Conrad and Schmidt, Consulting Engineers, Inc. d/b/a SCS Energy  
7 states the following counterclaim against ISM Industries, Inc.:

8 **JURISDICTION AND VENUE**

9 1. This Court has supplemental jurisdiction over Defendant and  
10 Counterclaimant’s state law counter claim for relief pursuant to 28 U.S.C. §  
11 1367(a).

12 2. Venue is proper in this judicial district pursuant to 28 U.S.C. §  
13 1391(b)(1), as Defendant and Counterclaimant’s principal place of business is  
14 located in Long Beach, California.

15 **PARTIES**

16 3. Plaintiff and Counter-Defendant ISM Industries, Inc. (“ISM”) is a  
17 Texas corporation with its principal place of business in Vidor, Orange County,  
18 Texas.

19 4. Defendant and Counterclaimant Stearns, Conrad and Schmidt,  
20 Consulting Engineers, Inc. d/b/a SCS Energy (“SCS”) is a Virginia corporation  
21 with its principal place of business in Long Beach, California.

22 **STATEMENT OF FACTS**

23 **A. SCS Contracted to Build a Biomethane Facility**

24 5. In April 2016, the University of California (“UC”) entered into a  
25 turnkey contract (the “Prime Contract”) with SCS for SCS to design and build a  
26 biomethane facility at the Woolworth Road Landfill in Shreveport, Louisiana (the  
27 “Project”).  
28

1           6.     The Project consists of two sites: a gas processing plant (“GPP”) and a  
2 gas compression plant (“GCP”).

3           7.     In September 2017, SCS issued “Service Purchase Order 06-  
4 SO00030” (the “Subcontract”) to ISM as a principal subcontractor to (1) construct  
5 the GPP, including civil, structural, mechanical, insulation, access road  
6 maintenance, and painting, and (2) perform rigging and setting of the compressor at  
7 the GCP.

8     **B.     ISM Agreed to Substantially Complete Its Work by February 11, 2018**  
9     **for \$1,709,872.**

10          8.     SCS relied on ISM’s experience and representations regarding its  
11 estimating and scheduling capabilities in agreeing to award the Subcontract to ISM.  
12 Pursuant to the Subcontract, ISM agreed to substantially complete all of its work on  
13 the GPP and GCP on or before February 11, 2018 for the defined lump sum price of  
14 \$1,709,872. ISM owed a duty to, among other things, (1) promptly and efficiently  
15 complete the work; (2) proceed with the work in a prompt and diligent manner in  
16 accordance with SCS’s schedule; and (3) satisfy itself as to the meaning and  
17 intention of the plans, technical specifications, and other documents related to the  
18 work.

19          9.     Before awarding the Subcontract and in connection with the bidding  
20 process, SCS provided ISM with a detailed bid package containing isometric  
21 drawings (overall facility), civil drawings, mechanical drawings (piping plans with  
22 details), process drawings (PFD & P&ID), and GPP isometric drawings. The  
23 documents provided to ISM during the bidding process are consistent with industry  
24 standard.

25          10.    Not until on or about October 24, 2018 did SCS learn that ISM relied  
26 only on the isometric drawings and ignored the mechanical drawings and process  
27 drawings to formulate its bid. ISM’s reliance on only the isometric drawings to  
28 formulate its bid is inconsistent with industry practice. Further, ISM’s failure to

1 follow industry practice led ISM to inaccurately bid the Project to only later request  
2 exorbitant additional amounts from SCS through change orders. Specifically, with  
3 an original contract amount of \$1,709,872, ISM submitted change orders totaling  
4 \$1,395,310.78.

5 **C. ISM's Poor Performance Resulted in Significant Inexcusable Delay and**  
6 **Cost Overruns**

7 11. ISM's productivity on the Project was poor.

8 12. ISM also failed to properly staff the work notwithstanding its  
9 representations to SCS that it would increase personnel and provide a proper crew  
10 mix.

11 13. The turnover rate of ISM's key personnel, including Project  
12 superintendents, resulted in a loss of continuity of management of the Project and  
13 further inefficiencies.

14 14. ISM failed to perform its work in accordance with industry standard  
15 requiring significant rework and repair.

16 15. As a result of ISM's poor workmanship, poor productivity, and delay,  
17 SCS incurred significant additional costs on the Project.

18 16. Among other things, SCS incurred additional direct and indirect costs  
19 as a result of ISM's inefficiency and delay including, without limitation, additional  
20 trailer and equipment rental costs, and additional supervision.

21 **D. ISM Abandoned the Project Before Completing Its Work**

22 17. In June 2018, ISM left the Project site.

23 18. In July 2018, SCS began to compile a punchlist of work remaining to  
24 be performed by ISM. SCS discussed the punchlist with ISM on several occasions.  
25 SCS sent ISM a final punchlist on or about October 11, 2018. On or about January  
26 22, 2019, SCS notified ISM that it had failed to perform punchlist work and other  
27 work that was within ISM's scope of work, and thus, paid for by SCS as part of the  
28 lump sum amount paid to ISM. SCS gave ISM until February 15, 2019 to complete

1 the punchlist work or SCS would self-perform or have others perform it.

2 19. Notwithstanding this notice, ISM failed to return to the site and failed  
3 to finish its work.

4 20. As a result of ISM's failure to complete the work, SCS has been forced  
5 to perform some the remaining work and will need to hire replacement contractors  
6 to perform other portions of the remaining work. This resulted in additional costs  
7 and delay, currently estimated to exceed \$90,000.

8 **E. ISM Failed to Pay Its Subcontractors in Breach of the Subcontract**

9 21. ISM contracted with several subcontractors in connection with its  
10 work on the Project.

11 22. ISM failed to pay certain subcontractors on the Project.

12 23. ISM's failure to pay its subcontractors caused certain subcontractors to  
13 (i.) file statements of claim and privilege pursuant to the Louisiana Private Works  
14 Act, and/or (ii.) to make claims against SCS's surety bond on the Project.

15 24. The Subcontract mandates that ISM timely pay its subcontractors and  
16 keep the Project free of any liens and encumbrances.

17 25. ISM's failure pay its subcontractors and failure to keep the Project free  
18 of liens and encumbrances are events of default under the Subcontract.

19 **F. SCS Is Entitled to Recover Damages Caused by ISM**

20 26. The following categories of damages have been incurred and are  
21 continuing to be incurred as a result of ISM's failure to perform its obligations:

Category of Damages	Estimated Amount
Delay Costs	\$510,000
Incomplete Work (including punchlist work)	\$90,000
Amounts Paid to ISM's Vendors	\$120,000
Attorney's Fees	To be determined

27 /////

28 /////

**COUNT I**

**BREACH OF CONTRACT AGAINST ISM**

27. SCS incorporates paragraphs 1 through 26 as if fully stated herein.

28. The Subcontract is a valid, enforceable contract. ISM materially breached the Subcontract and caused SCS to incur damages as a result of ISM's breach of its obligations. Among other things, ISM inexcusably delayed completion of the Project and failed to complete the work pursuant to the Subcontract.

29. ISM further materially breached the Subcontract by failing to timely pay its subcontractors and failing to keep the Project free of any liens and encumbrances.

30. At all relevant times, SCS performed its obligations under the Subcontract.

31. SCS has been damaged, and will continue to incur damages, as a result of ISM's breach in an amount to be proven at trial, currently estimated in excess of \$720,000.

**PRAYER FOR RELIEF**

WHEREFORE, Defendant and Counterclaimant Stearns, Conrad and Schmidt, Consulting Engineers, Inc. d/b/a SCS Energy respectfully requests that:

1. Judgment be entered in favor of SCS and against ISM on all counts of ISM's Complaint;

2. Judgment be entered in favor of SCS and against ISM for breach of contract in an amount to be proven at trial, but which is believed to exceed \$720,000;

3. That SCS be awarded attorney's fees;

4. That all costs of this action be taxed against ISM; and

5. For such other and further relief as this Court may deem just and proper.

1 Dated: March 7, 2019

MANATT, PHELPS & PHILLIPS, LLP  
Craig J. de Recat

3 By: /s/ Craig J. de Recat

4 Craig J. de Recat  
5 *Attorneys for Defendant and*  
6 *Counterclaimant*  
7 STEARNS, CONRAD AND  
8 SCHMIDT, CONSULTING  
9 ENGINEERS, INC. D/B/A SCS  
10 ENERGY

JONES WALKER LLP  
Christopher D. Cazenave

11 By: /s/ Christopher D. Cazenave

12 Christopher D. Cazenave  
13 *Pro Hac Vice*  
14 *Attorneys for Defendant and*  
15 *Counterclaimant*  
16 STEARNS, CONRAD AND  
17 SCHMIDT, CONSULTING  
18 ENGINEERS, INC. D/B/A SCS  
19 ENERGY  
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**PROOF OF SERVICE OF DOCUMENT**

I am over the age of 18 and not a party to this case. My business address is 11355 West Olympic Boulevard Los Angeles, California 90064-1614.

A true and correct copy of the foregoing document described as **DEFENDANT AND COUNTERCLAIMANT STEARNS, CONRAD AND SCHMIDT, CONSULTING ENGINEERS, INC. D/B/A SCS ENERGY'S COUNTERCLAIM TO PLAINTIFF ISM INDUSTRIES, INC.'S COMPLAINT** was served in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC**

**FILING** – Pursuant to controlling General Order(s), the foregoing document will be served by the court via the CM/ECF docket for this case and determined that the following(ing) person(s) are on the Electronic Mail Notice List to receive transmission at the email addresses indicated below:

STEVEN M. BURTON Email: [steve@txconstructionlaw.com](mailto:steve@txconstructionlaw.com)

BRIAN KEITH CARROLL Email: [brian@txconstructionlaw.com](mailto:brian@txconstructionlaw.com)

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STUART C. YOES Email: [scy@yoeslawfirm.com](mailto:scy@yoeslawfirm.com)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 7, 2019  
Date

Craig J. de Recat  
Type Name

/s/ Craig J. de Recat  
Signature